United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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IRCUIT
United States Court of Appeals
For the
District of Columbia Circuit
FILED JAN 20 1960
Joseph W. Stewart
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VIRGIL V. LAMPE,

Appellant

vs.

UNITED STATES OF AMERICA,

Appellee

BRIEF FOR APPELLANT

On Appeal from the United States
District Court for the District of Columbia

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QUESTIONS PRESENTED

1. Whether a motion under Title 28, §2255, filed by appellant, a prisoner who has served approximately 5 years of an 8- to 24-year sentence for second degree murder, should have been denied by the trial court without any hearing, upon a required finding that the files and records of the case conclusively showed that he was entitled to no relief, when the motion and the files and records of the case actually showed the following:

a. That appellant was given a preliminary hearing by a Coroner's inquest, and at said hearing the Coroner not only failed to advise him of his constitutional right to counsel, but also deprived him of his constitutional right to effective confrontation of the witnesses by requiring all questions propounded by him to be asked through the Coroner.

b. That testimony admitted at such preliminary hearing in the above circumstances, although deemed prejudicial as a matter of law, was also prejudicial in fact and was a primary cause of his later conviction and the affirmance of that conviction.

c. That appellant's "confession," signed while he was suffering from delirium tremens and was showing evidence of being of unsound mind, was admitted into evidence despite the fact that the only possibly competent evidence offered of its "voluntary" nature failed to even touch upon that issue.

2. Whether appellant's aforesaid motion should have been denied without hearing when certain files and records of the case not previously offered in evidence at the trial but since exposed by appellate counsel herein and now available to the trial court, make it probable that appellant did not receive a fair trial, that the confession would not have been admitted at all, that appellant would not have been convicted, nor would this Court have affirmed such conviction.

3. Whether appellant, because of the above, was denied basic constitutional rights and whether such denial may be asserted in this proceeding.

I N D E X

	Page
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	1
STATUTES INVOLVED	5
STATEMENT OF POINTS	6
SUMMARY OF ARGUMENT	7
ARGUMENT	8
I. DEFENDANT'S RIGHT TO COUNSEL WAS VIOLATED IN THE PROCEEDINGS BEFORE THE CORONER WHEN HE WAS NOT APPRISED OF THAT RIGHT, AND, ALTHOUGH UNNECESSARY TO WARRANT RELIEF UNDER §2255, THIS VIOLATION DID OPERATE TO SUBSTANTIALLY PREJUDICE DEFENDANT AT HIS SUBSEQUENT TRIAL	8
A. Introduction	8
B. Defendant Had a Constitutional Right to Counsel at the Coroner's Inquest, and the Violation of That Right by the Failure of the Coroner to So Apprise Defendant Vitiated His Subsequent Conviction	11
C. Although the Violation of Defendant's Constitutional Right to Counsel Requires Reversal Without Considering Whether He Was In Fact Prejudiced Thereby, the Record In This Case Clearly Establishes Substantial Prejudice	16
II. INDEPENDENT INVESTIGATION BY COUNSEL APPOINTED BY THE COURT AFTER THIS APPEAL WAS INITIATED HAS REVEALED EVIDENCE OUTSIDE THE ORIGINAL RECORD THAT DEMONSTRATES A FUNDAMENTAL MISCARRIAGE OF JUSTICE IN PETITIONER'S CONVICTION	20
A. Introduction	20
B. An Independent Investigation Was Necessary	24
C. Results of the Independent Investigation	25
1. The Temperature Chart	25
2. Pulse Chart	25
3. Respiration Chart	25

INDEX (Cont'd.)

		Page
	4. Nurses' Record	26
	5. Doctors Orders Sheet and Admission Record	26
	6. The Daily Record at the Central Control Office	26
	D. Argument	26
III.	A HEARING ON APPELLANT'S MOTION UNDER §2255 WAS REQUIRED BECAUSE HIS ALLEGED CONFESSION WAS ADMITTED INTO EVIDENCE IN VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION, AND THE MOTION, THE FILES AND THE RECORD OF THE CASE DO NOT CONCLUSIVELY SHOW THAT APPELLANT IS ENTITLED TO NO RELIEF	29
	A. Introduction	29
	B. Section 2255 Requires A Hearing Unless the Motion, the Files and the Record of the Case Conclusively Show That Appellant Is Entitled to No Relief	31
	C. The Only Way to Resolve Substantial Issues of Fact Regarding the Involuntariness of Appellant's Confession Is By a Hearing in the District Court	32
	D. Appellant's Conviction Resulted From a Deprivation of His Rights Under the Fifth Amendment to the Constitution, and Not Merely From an Error by the Trial Judge Regarding a Rule of Evidence	34
	E. The Court Has Power Under a §2255 Motion To Do Substantial Justice on the Merits of the Case, Regardless of Whether Petitioner Has Previously Raised the Constitutional Deprivation on Appeal . . .	39
CONCLUSION		48
EXHIBITS		
	No. 1. The Temperature, Pulse and Respiration Charts	
	No. 2. Nurses' Record	
	No. 3. Doctor's Order Sheet	
	No. 4. Admission Record	

INDEX (Cont'd.)

Page

Table of Cases

Bailey v. U. S., 101 U. S. App. D. C. 11, 246 F. 2d 698 (1957) 31

Blackburn v. Alabama, ___ U. S. ___ (No. 50, decided January 11, 1960) 32,33,35,38,40

Bowen v. Johnston, 306 U. S. 19 (1939) 27,38,40,46,47

Burns v. Lovett, 91 U. S. App. D. C. 208, 202 F. 2d 335 (1952) 12

Carter v. U. S., 102 U. S. App. D. C. 227, 252 F. 2d 608 (1957) 33

Chambers v. Florida, 309 U.S. 227, 84 L. Ed. 716 (1940) 33,35

Cicenia v. La Gay, 357 U. S. 504, 78 S. Ct. 1297, 2 L. Ed. 2d 1523 (1958) 12

Clarke v. Huff, 73 App. D. C. 351, 119 F. 2d 204 (1941) 10,12

Coates v. U. S., ___ U. S. App. D. C. ___, ___ F. 2d ___ (No. 15,203, this Court, decided December 10, 1959) 27,31,32, 33,34,39,47

Crooker v. California, 357 U. S. 433 (1958) . . . 12

Edwards v. U. S., 78 U. S. App. D. C. 226, 139 F. 2d 365 (1943), cert. den., 321 U. S. 769, 64 S. Ct. 523, 88 L. Ed. 1064 (1944) 11

Eury v. Huff, 79 U. S. App. D. C. 289, 146 F. 2d 17 (1944) 37-38

Evans v. Rives, 75 U. S. App. D. C. 242, 126 F. 2d 633 (1942) 11,12

Fikes v. Alabama, 352 U. S. 191 (1957) 35,44-45

Fleming v. Tate, 81 U. S. App. D. C. 205, 156 F. 2d 848 (1946) 12

Gadsden v.U. S., 96 U. S. App. D. C. 162, 223 F. 2d 627 (1955) 11

In Re Groban, 352 U. S. 330, 1 L. Ed. 2d 376 (1957) 21

Hill v. U. S., 223 F. 2d 699 (6th Cir. 1955) 28,39

Hodges v. U. S., ___ U. S. App. D. C. ___, ___ F. 2d ___ (No. 14,683, decided December 30, 1959) 28,38,39, 42,43,44

Page

Table of Cases (Cont'd.)

Hopkins v. U. S., No. 14,939, this Court, decided December 11, 1959 33

Johnson v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938) 11,12,17,19, 27,40,43,46,47

Lampe v. U. S., 97 U. S. App. D. C. 160, 229 F. 2d 43 (1956) 2,17,18-19

Lee v. U. S., 98 U. S. App. D. C. 272, 235 F. 2d 219 (1956) 11

Mallory v. U. S., 354 U. S. 449 (1957) 35,36,37,38

McKenzie v. U. S., 75 U. S. App. D. C. 270, 126 F. 2d 533 (1942) 27

McKinney v. U. S., 93 U. S. App. D. C. 222, 208 F. 2d 844 (1953) 11

McNabb v. U. S., 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed. 819 (1943) 14,35,36, 37,38,45,47

Mitchell v. U. S., 322 U. S. 65 (1944) 36,37,38

Mooney v. Holohan, 294 U. S. 103 (1935) 27

Moore v. Reid, 100 U. S. App. D. C. 373, 246 F. 2d 654 (1957) 11,12,27

Neely v. U. S., 79 U. S. App. D. C. 177, 144 F. 2d 519 (1944) 13,14

Noble v. Eicher, 79 U. S. App. D. C. 217, 143 F. 2d 1001 (1944) 11

Poole v. U. S., 102 U. S. App. D. C. 75, 250 F. 2d 396 (1957) 47

Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932) 11

Smith v. U. S., 88 U. S. App. D. C. 80, 187 F. 2d 192 (1950), cert. den., 341 U. S. 927 (1951) 38,39,41

Sunal v. Large, 332 U. S. 174 (1947) 41

U. S. v. Hayman, 342 U. S. 205, 72 S. Ct. 263, 96 L. Ed. 232 (1952) 42-43

U. S. v. Morin, 163 F. Supp. 941 (W.D. Pa., 1958) 36

Waley v. Johnston, 316 U. S. 101 (1942) 27,42

Walker v. Johnston, 312 U. S. 275 (1941) 31

Page

Table of Cases (Cont'd.)

Watts v. Indiana, 338 U. S. 49 45

Weeks v. U. S., 232 U. S. 383 (1914) 46

Wolf v. Colorado, 338 U. S. 25 (1949) 46-47

Wood v. U. S., 75 U. S. App. D. C. 274, 128 F. 2d 265 (1942) 10,11,12

Treatises

Hogan & Snee, The McNabb - Mallory Rule, 47 Georgetown L. J. 1 (1958) 36,37

Annotations

Annotation, 2 L. Ed. 2d 1644-1655 11

Statutes

§11-1203, D. C. Code 13

§11-1205, D. C. Code 13,14

Title 28, §2254, U. S. Code 5

Title 28, §2255, U. S. Code . . . . . 1,5-6, etc.

Rules

Rule 5, F. R. Crim. P. 10,12

JURISDICTIONAL STATEMENT

Appellant was convicted of second degree murder in the court below and is presently serving his sentence for that conviction. Petitioner's motion for relief under Title 28, §2255, U. S. Code, was denied without hearing by the lower court, and this denial operates as a final judgment, which this Court has jurisdiction to review under the provisions of Title 28, §2255, U. S. Code.

STATEMENT OF THE CASE

Appellant, Virgil V. Lampe (hereinafter also called "Lampe" or "defendant"), was convicted by a jury of the crime of second degree murder on January 11, 1955 and sentenced to a term of 8 to 24 years, of which he has served approximately 5 years to date. This is an appeal from the third denial of three motions filed by defendant without benefit of counsel under the provisions of Title 28, §2255, U. S. Code, all of which have been denied without hearing by the same trial judge who presided at defendant's trial, upon a required finding that these motions and the files and records of the case conclusively showed that the defendant was entitled to no relief. Petitions for leave to appeal *in forma pauperis* were filed upon the denial of the two previous motions under §2255 and were denied. This case is now in this Court for the first time since the judgment of this Court affirming the conviction, because the trial judge has, for the first time, allowed an appeal *in forma pauperis* from the last denial of defendant's motion for relief under §2255. For these reasons, the provisions of §2255 permitting the sentencing court to refuse to entertain a second or successive motion for similar relief on behalf of the same defendant are not believed applicable in this case because, since defendant's financial incapacity to appeal is admitted, there has been no

review and no opportunity for review of the denial of hearings on the previous petitions. For the same reasons, pertinent allegations of the two previous petitions filed by defendant under §2255 are incorporated for review on this appeal (App. 174-182, 183-205, 207-211, 213-217).[1]

The entire record from the trial court in defendant's case below, Criminal No. 899-54, is now in this Court, together with the Briefs and Joint Appendix in Case No. 12,551, wherein the conviction was affirmed in an opinion handed down on January 19, 1956. Lampe was represented by court-appointed counsel at the trial, and different court-appointed counsel in that appeal. In that appeal, the sole questions raised by court-appointed counsel involved the admissibility of certain res gestae statements made by the victim, and claimed error by the trial court in failing to make clear to the jury that evidence admissible as to Lampe's co-defendant, O'Brien, was inadmissible as to Lampe. Accordingly, the opinion of this Court in No. 12,551 (97 U. S. App. D. C. 160, 229 F. 2d 43 (1956)) was directed solely to the limited points raised on that appeal and did not consider any of the points which will be raised in this appeal.

In order for the Court to better appraise the issues herein, the following chronology will be helpful:

Fri., 7/16/54	7:00 p.m.	A fight occurred during a drinking party involving defendant, Lampe, co-defendant, O'Brien, and deceased, LaMar, in Barnard Hill Park (App. 2).

[1] References to Joint Appendix in previous appeal (No. 12,551) will be indicated by "J.A. ___." References to present Joint Appendix will be indicated by "App. ___."

Sat., 7/17/54	3:45 a.m.	Decedent LaMar regained consciousness from beating and crawled from park (App. 3).
Sat., 7/17/54	4:10 a.m.	Police Officers Chief Schatz and Officer Miller of Mt. Rainier Police saw deceased outside of Barnard Hill Park (J.A. 29).
Sat., 7/17/54	4:15 a.m.	Defendant arrived at No. 12 Precinct with Officers Schatz and Miller (J.A. 41).
Sat., 7/17/54	7:30 a.m.	Officer Shoop talked to defendant for five minutes at No. 12 (App. 7-8).
Sat., 7/17/54	9:00 a.m.	Defendant taken to identification bureau of police department where first seen by Sgt. Schwab (App. 63).
Sat., 7/17/54	Unknown	Defendant taken to Municipal Court and case continued to Aug. 3, 1954 (App. 8-9).
Sat., 7/17/54	8:00 p.m.	Defendant Lampe admitted to D. C. Jail Hospital (App. 32).
Sun., 7/18/54	11:50 p.m.	Decedent LaMar pronounced dead (App. 3).
Mon., 7/19/54	8:00 a.m.	Sgt. Schwab of Homicide notified of LaMar's death (App. 3).
Mon., 7/19/54	Between 10:00 a.m., 10:30 a.m.	Defendant "discharged" from hospital (App. 32, 35, 68-69, 71).

Mon., 7/19/54	10:30 a.m.	Defendant vrought to Sgt. Schwab, Pvt. Sandburg and Precinct Detective Flynn in D. C. Jail, and Sgt. Schwab talked to defendant about five minutes at this time in presence of other officers and advised defendant that LaMar had died (App. 47, 60-61).
Mon., 7/19/54	10:10 a.m.-11:15 a.m.	Confession of O'Brien taken by Sgt. Schwab in Col. Fleming's office of D. C. Jail (J.A. 61; App. 98-102).
Mon., 7/19/54	11:30 a.m.-12:25 p.m.	Confession of defendant Lampe taken by Sgt. Schwab in Colonel Fleming's office of the D. C. Jail (J.A. 50, 57-61; App. 37, 55-56, 60-61, 65, 86).
Mon., 7/19/54	3:40 p.m.	Defendant Lampe "readmitted" to hospital on Dr. Orsinger's order (App. 35), and treated for dt's.
Thu., 7/22/54	Unstated	Discharged from hospital (App. 70-71). No time of day stated.
Fri., 7/23/54	11:40 a.m.	Coroner's inquest begun (App. 1).
Fri., 7/23/54	12:30 p.m.	Coroner's jury out for deliberation. Defendant held for action of Grand Jury (App. 22).
8/23/54		Lampe indicted for second degree murder (J.A. 102).
8/26/54		Lampe arraigned - plea, not guilty (J.A. 103).

1/6/55	Trial begun (J.A. 21).
1/12/55	Trial ended. Verdict: O'Brien, "not guilty"; Lampe, "guilty" (J.A. 104-105).

Additional facts which are relevant, respectively, to sections I, II and III of this brief are found in the "Introduction" to each particular section.

STATUTES INVOLVED

Title 28, §2254, U. S. Code:

"State custody; remedies in State courts

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

Title 28, §2255, U. S. Code:

"Federal custody; remedies on motion attacking sentence

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings

of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus."

* * * *

STATEMENT OF POINTS

The following errors were violative of appellant's constitutional rights under the Fifth and Sixth Amendments to the Constitution:

1. Appellant was denied the right to counsel and right of effective confrontation at the Coroner's inquest, and evidence admitted against him at such inquest resulted in deprivation of his right to a fair trial and in the affirmance of his conviction by this Court.

2. Appellant's conviction was based upon a confession which, either he did not consciously make at all, or which was made while appellant was suffering from delirium tremens which sufficiently affected his mental capacity to render such confession involuntary. This confession was a substantial factor in his conviction and was relied upon in the affirmance of his conviction by this Court.

SUMMARY OF ARGUMENT

It is clear from the record that defendant was deprived of his constitutional right to counsel at the preliminary hearing in this case; he was not advised of his right to counsel; his right to effective confrontation of witnesses was destroyed by the direction of the Coroner to ask all questions through him; and, as a result, evidence was initially admitted against him at such preliminary hearing which became of crucial importance at the trial in causing certain res gestae statements of the victim to be admitted. This was of primary importance in his conviction and the later affirmance of that conviction by this Court. The transcript of the Coroner's inquest in this case demonstrates clearly that a defendant in the District of Columbia who is charged with homicide is deprived of the basic constitutional rights which are afforded those accused of lesser offenses.

Independent investigation by counsel appointed by this Court since the initiation of this appeal has resulted in the discovery of records used, but not introduced in evidence, at the trial, which make it probable that defendant was not examined and discharged from the hospital just prior to his confession, as the trial court and the jury were led to believe, and, therefore, defendant was not given a fair trial. Such records, now before this Court, warrant a full hearing by the trial court in response to defendant's motion under §2255.

Appellant's motion under §2255 and the files and records of the case show that his constitutional rights were violated by admission into evidence of a confession that appellant did not have sufficient mental capacity to make voluntarily. Appellant's brain was disturbed as a result of incipient delirium tremens; he showed evidence of being "of unsound mind"; his discharge from the hospital just prior to the confession was based upon a superficial examination lasting just a few seconds; and he had to be readmitted to the

hospital a few hours after the confession, where he later became so violent that he was placed in restraints. The record shows further its own deficiency regarding several important issues of fact relating to the involuntariness of the confession. There was no testimony directed to the effect of delirium tremens upon the will; no expert psychiatric testimony at all; and no clarification of testimony creating ambiguity as to the mental effects upon an alcoholic of withdrawal from alcohol. These factual issues can only be resolved in a hearing under §2255, devoted to determining whether the confession was "the product of a meaningful act of volition."

Assuming that such a hearing would demonstrate that the confession was not the product of a meaningful act of volition, appellant has been deprived of rights under the due process clause of the Constitution. This raises not merely an issue of "error in the admission of evidence," as is presented in cases involving confessions obtained during illegal detention (the McNabb rule). The confession in this case was truly involuntary, and its use in evidence therefore violated the Fifth Amendment. It is believed immaterial, therefore, that appellant did not raise these issues on direct appeal.

Moreover, the scope of review under §2255 is broader than habeas corpus both at common law and under §2254, which relates to state prisoners, and exhaustion of direct appeal should not be necessary when, as in the present case, the motion, files and record as a whole demonstrate a substantial miscarriage of justice.

ARGUMENT

I. DEFENDANT'S RIGHT TO COUNSEL WAS VIOLATED IN THE PROCEEDINGS BEFORE THE CORONER WHEN HE WAS NOT APPRISED OF THAT RIGHT, AND, ALTHOUGH UNNECESSARY TO WARRANT RELIEF UNDER §2255, THIS VIOLATION DID OPERATE TO SUBSTANTIALLY PREJUDICE DEFENDANT AT HIS SUBSEQUENT TRIAL.

A. Introduction.

The Coroner's Inquest was held at 11:40 a.m. on Friday, July 23, 1954. Defendant had been arrested at approximately 4:10 a.m. on Saturday, July 17, 1954, and booked at 4:15 a.m. that day. He was apparently taken to Municipal Court some time on July 17 after 9:00 a.m. and before 8:00 p.m. (App. 63, 32).[2]

He entered the D. C. Jail hospital at 8:00 p.m. on July 17th and was released about 38 hours later, at about 10:00 or 10:30 a.m. on Monday, July 19th (App. 32, 35, 68-69, 71), but, instead of being given a preliminary hearing, he was ushered into Colonel Fleming's office at the D. C. Jail and turned over to three police officers who were waiting for him in a room "set aside" for their use. Sgt. Schwab there and then took his "confession" (J.A. 57-61; App. 47, 55-57, 60-61, 85-93).[3]

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[2] The record herein is scant as to what occurred at Municipal Court later in the day on July 17; Pvt. Shoop testified at the inquest that the charge was then assault with a deadly weapon, shod foot and two counts of robbery, but that no hearing was held; the A.D.W. was continued to August 3 and the robbery charge was "no paper" (App. 8-9). Lampe recalled nothing of this (App. 128-133). Even now, Lampe only remembers, or has been told, that he was committed by Judge Nadine Gallagher to District Jail to be treated for alcoholism (App. 196).

[3] It was obviously more than coincidence that Sgt. Schwab, who had been notified of LaMar's death at 8:00 a.m. on the 19th (App. 3), happened to be at the Jail hospital at about 10:00 - 10:30 a.m. when defendant was released as fit for return to the cell block (App. 32, 35, 68-69, 71).

Defendant was readmitted to the hospital at 3:40 p.m. that same day (the 19th), where he remained for three more days until Thursday, July 22nd, and was then finally released (App. 69-71). The next morning (July 23rd) at 11:40 a.m., he was brought to the Coroner's inquest (App. 1).

It therefore appears that defendant was in police custody prior to the inquest for a total of approximately six days, of which only approximately 4-1/2 days were spent in the hospital. In any event, no reason was given why defendant was not given a preliminary hearing between 10:00 or 10:30 a.m. on July 19th and 3:40 p.m. on July 19th, approximately five hours; and between his second release from the hospital some time on July 22nd and 11:40 a.m. on July 23rd, at least 11-1/2 hours, and possibly 23-1/2 hours.[4]

There is nothing in the record to show that defendant was ever apprised of his constitutional right to counsel from the moment of his arrest at 4:10 a.m. on July 17th until at or about the time of his arraignment on August 26, 1954. The record does not show it was done at Municipal Court when the case was continued (App. 8-9). It was not done at the time of his confession (App. 94); and it was certainly not done at the Coroner's inquest (App. 2). Lampe himself did not know of his right to counsel. The record shows that he had been an alcoholic since 1948 (App. 125) and had previously had "dt's" either five or nine times, the last of which was only a month prior to this arrest (App. 73, 126); that he had been drinking heavily for three weeks with little food prior to his arrest (App. 73, 134); that on May 7, 1951 two physicians in Maryland had certified that he was insane (App. 116-120); that he had been jailed at various

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[4] Medical records not part of the record herein, but hereinafter referred to, indicate he was finally released between 8:00 a.m. and 12:00 noon on July 22nd.

times for drinking (App. 138-139); that he was the product of a broken family and "on his own" since ten years of age (App. 172); that he had only a sixth or eighth grade education (App. 128, 191); and, finally, that he did not know of his constitutional right to counsel until a cellmate had his own court-appointed lawyer call on him just prior to the arraignment on August 26, 1954 (App. 191-192). This is corroborated by the fact that defendant's criminal record introduced at the Coroner's inquest showed only that there had been charges against him -- not convictions; a larger number of drunk charges; a charge of mental observation on May 8, 1952, a charge of A.D.W., shod foot, on September 26, 1952, and a charge of assault on November 15, 1952 (App. 18). No reference was made to the disposition of these matters, or whether he had ever been represented by an attorney.

In his three petitions under §2255, Lampe has frequently raised the issue of the failure to advise him of his right to counsel (App. 188, 190, 191, 194, 215), and this has been met only by the U. S. Attorney's citation to the court below of the case of Clarke v. Huff, 73 App. D. C. 351, 119 F. 2d 204 (1941) (App. 209, 216), which, as later shown, is not in point. No reference was made by the U. S. Attorney to the later Wood case, infra, which is directly in point. This has undoubtedly contributed to the trial court's denial of all of the defendant's motions under §2255 without affording a hearing.

This case, we sincerely feel, involves an important question relating to the proper pre-trial procedures in homicide cases. More precisely, the issues in this case focus upon the relationship between the Coroner's inquest (which in homicide cases in the District of Columbia customarily takes the place of the preliminary hearing under Rule 5, F.R. Crim. P.) and the fundamental right to counsel under the Sixth Amendment to the Constitution. Our submission is that, in the District, pre-trial proceedings in homicide cases afford the accused fewer safeguards

than are available to one accused of a lesser offense; that the defendant was subjected to sub-standard proceedings before the Coroner where evidence was elicited which ultimately became critical to his conviction and the subsequent affirmance of that conviction on appeal; and that, by the time defendant finally had counsel at arraignment, his rights already had been irretrievably lost because the assistance of counsel came too late.

B. Defendant Had a Constitutional Right to Counsel at the Coroner's Inquest, and the Violation of That Right by the Failure of the Coroner to So Apprise Defendant Vitiated His Subsequent Conviction.

It is, of course, settled beyond dispute that the right to counsel under the Sixth Amendment requires the right to such assistance at "every stage of the proceedings" (Johnson v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938); Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932); Wood v. U. S., 75 U. S. App. D. C. 274, 128 F. 2d 265 (1942); Evans v. Rives, 75 U. S. App. D. C. 242, 126 F. 2d 633 (1942); Edwards v. U. S., 78 U. S. App. D. C. 226, 139 F. 2d 365 (1943), cert. den., 321 U. S. 769, 64 S. Ct. 523, 88 L. Ed. 1064 (1944); Noble v. Eicher, 79 U. S. App. D. C. 217, 143 F. 2d 1001 (1944); McKinney v. U. S., 93 U. S. App. D. C. 222, 208 F. 2d 844 (1953); Gadsden v. U. S., 96 U. S. App. D. C. 162, 223 F. 2d 627 (1955); Lee v. U. S., 98 U. S. App. D. C. 272, 235 F. 2d 219 (1956). See also, Annotation, 2 L. Ed. 2d 1644-1655). The deprivation of that fundamental right is correctible in a proceeding which collaterally attacks the subsequent conviction. Johnson v. Zerbst, supra. It is also well established that the right to counsel involves the right to be apprised of its existence (Wood v. U. S., supra; Evans v. Rives, supra; see also, Moore v. Reid, 100 U. S. App. D. C. 373, 246 F. 2d 654 (1957).

Although an accused may not have a constitutional right to a preliminary hearing, Clarke v. Huff, 73 App. D. C. 351, 119 F. 2d 204 (1941), the law is settled that if and when such a hearing is afforded, it becomes an integral "stage" of the proceedings within the Johnson case, supra; the accused then has a constitutional right to counsel at the preliminary hearing. Wood v. U. S., supra.[5] The substance of this right has been embodied in Rule 5(b) of the Federal Rules of Criminal Procedure, which requires that upon preliminary hearing the accused be apprised of his right to counsel as well as his right against self-incrimination. Indeed, the requirements of the right to counsel have become so basic that even in state criminal proceedings -- where the right to counsel has only a limited application through the Fourteenth Amendment -- four Justices of the Supreme Court have declared that "The demands of our civilization expressed in the Due Process Clause require that the accused who wants a counsel should have one at any time after the moment of arrest." See the dissenting opinion of Mr. Justice Douglas in Crooker v. California, 357 U. S. 433, 441-448 (1958), in which opinion Chief Justice Warren and Justices Black and Brennan concurred. This was followed by a similar dissent in Cicenia v. La Gay, 357 U. S. 504, 78 S. Ct. 1297, 2 L. Ed. 2d 1523 (1958). Manifestly, an accused such as this defendant, an unschooled and semi-literate layman, whose body and mind were racked by an alcoholic stupor and the effects thereof during the entire period involved herein, cannot "want" counsel unless he knows and is made to understand that he has a right to such assistance.

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[5] These same principles were applied to a Juvenile Court hearing in Evans v. Rives, supra; Parole Board Examiner's and Board Hearings in Moore v. Reid, supra; Fleming v. Tate, 81 U. S. App. D. C. 205, 156 F. 2d 848 (1946); and courts martial proceedings in Burns v. Lovett, 91 U. S. App. D. C. 208, 202 F. 2d 335 (1952).

The above principles are well settled in non-homicide cases. The question is whether an accused in a homicide case is entitled to the same rights where, by the practice in the District, a Coroner's inquest customarily takes the place of a preliminary hearing. We submit that under those circumstances, the proceeding before the Coroner is not only a "stage of the proceeding" but a critical one. What is termed an "inquest" before the Coroner is the preliminary hearing for the person accused of a homicide. As such, the minimal safeguards which benefit the accused in a non-homicide case must be afforded to one accused of a homicide. He must be apprised of his right to counsel as well as his other rights.[6] Not only is this demonstrated by the gravity of the offense, but it is underscored when the peculiar duties of the Coroner are considered. Unlike the judge or commissioner who conducts a Rule 5 - preliminary hearing, the Coroner is at once judge and inquisitor. In his role as inquisitor, the Coroner is charged with the duty "to hold an inquest" in connection with the death of any person from non-accidental or unnatural causes, §11-1203, D. C. Code, and "where any person is charged with having unlawfully caused the death of the person on whom the inquest is held," §11-1205, D. C. Code, his inquisitorial duties include compelling the attendance and the testimony of witnesses, and his authority includes "taking the testimony of probable defendants provided it is given voluntarily after advice as to their rights." Neely v. U. S., 79 U. S. App. D. C., at 177-178, 144 F. 2d, at 519-520 (emphasis added). To this end, the Coroner is given broad powers of subpoena and he is required to reduce "the testimony of the witnesses to writing" and trasmit the transcript of the inquisition to the District Court. §11-1205, D. C. Code.

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[6] In Neely v. U. S., infra, the only pertinent local case involving a Coroner's hearing, the opinion states that defendant was informed of his constitutional rights.

But the Coroner's duties also involve "quasi judicial" functions. Neely v. U. S., supra. Under his guidance, the Coroner's jury determines whether there is sufficient evidence to show that "murder or manslaughter has been committed on the deceased . . ." §11-1205, D. C. Code. The Neely case emphasizes the impact which the Coroner's proceeding may have upon final conviction of the accused. Statements made by the accused at the Coroner's hearing (after being apprised of his "constitutional rights") were there held not within the rule of McNabb v. U. S., 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed. 819 (1943), and hence were admissible against the defendant at trial. The theory of the case was that such statements are not extra-judicial in nature and that the Coroner sits "in a quasi judicial capacity."

In short, the Coroner's functions, unlike those of a judge or commissioner holding a Rule 5 - preliminary hearing, involve a peculiar blend of judicial and investigatory powers. In such a proceeding, the accused's need for counsel is heightened. Unfortunately, the record in this case unmistakably establishes a complete and total violation of defendant's right to counsel.

The Coroner never advised defendant of his right to counsel but contented himself merely with the following statement made at the commencement of the proceedings:

> "THE CORONER: What is your name?
>
> "DEFENDANT: Virgil Lampe.
>
> "CORONER: Do you know where you are?
>
> "LAMPE: Yes.
>
> "CORONER: Do you know why you are here?
>
> "LAMPE: Yes.
>
> "CORONER: Since you are not represented by an attorney I will give you an opportunity to ask any questions you may have of the witnesses through me. But I must ask you not to make a statement; just ask

whatever you wish to know. Later on I will advise you about making a statement to this jury if you desire to. Do you understand, both of you?

"LAMPE: Yes" (App. 2).

Defendant went through the Coroner's proceeding without counsel, and he was nowhere informed that he was entitled to such assistance. Quite the contrary, he was told that in order to interrogate the witnesses against him, he was required to do so "through" the Coroner, who, as shown herein, acted in this case as both judge and assistant prosecutor. By this instruction, he also became defense counsel. We do not think it extravagant to state that this instruction constituted a shocking denial of effective confrontation of witnesses.

The potential vices which arise from this combination of judicial and inquisitory functions are graphically demonstrated by the occurrence which took place when defendant asked the only question propounded by him at the proceeding, which he was not even permitted to complete. The doctor who had pronounced LaMar dead was examined initially (as were all witnesses) by the Coroner (App. 3-5), an examination which bears reading insofar as it demonstrates an approach and tenor more consistent with an examination conducted by a prosecuting attorney. At the conclusion of that interrogation, the following occurred:

"DEFENDANT LAMPE: Could that man [decedent] have fell when he left that park as drunk as he was, because we both slept --

"THE CORONER: You see, you are making a statement. If you want to ask this doctor could these injuries this man received been due to a fall.

"THE WITNESS: Of course I think they could have been due to a fall" (App. 6).

It is evident that the defendant's question was a highly pertinent one. But the Coroner was evidently displeased with the witness' response, for immediately following the above, the transcript indicates that the Coroner again took up his

inquisitorial cudgel in the following manner:

> "BY THE CORONER:
>
> "Q. You mean with the contusions all about his face and all about his chest, all that could happen in one fall? A. I know nothing about the circumstances of the --
>
> "Q. But you are answering a theoretical question, Doctor. A. I'm sure there are cases on record where people have received such lacerations and injuries due to a fall. Now, what type fall -- it wouldn't merely be falling down I don't suspect. I think he could fall off --
>
> "Q. Off a building? A. Off a high elevation; maybe off a cliff or something.
>
> "Q. But a man falling his length to the ground couldn't have received all those injuries in one fall, could he? A. I don't say it is impossible, but it is a little improbable.
>
> "Q. All right.
>
> "(The witness left the stand)" (App. 6).

The record before the Coroner is replete with such partisan conduct on the part of that presiding officer (for example, see App. 18, where the Coroner elicited further damaging testimony to Lampe which had been omitted by the witness; and then the Coroner asked about defendant's criminal record for the benefit of the Coroner's jury). We do not entirely condemn it; the conflicting duties imposed upon the Coroner perhaps render it unavoidable. But we do say that these very circumstances render indispensable the need of a defendant to have, if he so desires, the effective assistance of counsel in every inquest before the Coroner.

C. <u>Although the Violation of Defendant's Constitutional Right to Counsel Requires Reversal Without Considering Whether He Was In Fact Prejudiced Thereby, the Record In This Case Clearly Establishes Substantial Prejudice.</u>

Once a denial of an accused's constitutional right to counsel is established, as we submit it is in this case, result-

ing prejudice to the defendant is presumed as a matter of law (Johnson v. Zerbst, and other cases cited with it, supra). While defendant is, on that basis alone, entitled to a reversal of the order below, the record of the aftermath of the Coroner's proceedings shows that this defendant was seriously prejudiced by the lack of counsel at the initial stages, and that it was too late for counsel appointed after the indictment to assist defendant effectively.

The manner in which defendant was prejudiced by the deprivation of his right to counsel at the Coroner's inquest may be demonstrated most succinctly by the account of defendant's trial as set forth in this Court's opinion in Lampe v. U. S., 97 U. S. App. D. C. 160, 229 F. 2d 43 (1956). Three declarations made to police officers by the decedent at various times subsequent to the assault were admitted into evidence over defendant's objection that none of them constituted spontaneous declarations. Each declaration identified defendant Lampe as the primary assailant. In determining whether the first purported declaration was spontaneous, the trial court, in the absence of the jury, read and considered the testimony given before the Coroner by Chief Schatz, one of the two officers who first spoke to the decedent after the assault. The officer who gave that testimony before the Coroner was not a witness at defendant's trial, yet his testimony at the inquest was a factor which influenced the exercise of the trial court's discretion in holding that the first declaration was spontaneous.[7]

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[7] The U. S. Attorney thought this sufficiently important to make it part of the record for this Court on the previous appeal by a special order of the trial court (App. 171). This testimony is found in the Joint Appendix in No. 12,551, this Court, at pp. 108-109, and referred to by the U. S. Attorney in the "Counterstatement of the Case" on that appeal (p. 4) as follows: "The trial court after hearing Officer Miller's testimony and having read the coroner's testimony of Chief Schatz determined that the challenged testimony was admissible as a spontaneous declaration under the authority of the Guthrie case (R. 39)."

So obviously crucial was that pre-trial testimony to the admissibility at trial of the declaration that this Court's opinion quoted it at length in affirming the trial court's ruling on the initial declaration (97 U. S. App. D. C., at 162, 229 F. 2d, at 45). Thus, although defendant was never represented by counsel before the Coroner and was never even apprised of his right to counsel, the testimony taken at that proceeding did have a substantial impact upon the admission of hearsay declaration identifying defendant as the assailant.[8]

Furthermore, it seems reasonably clear that the testimony taken before the Coroner influenced this Court's opinion affirming defendant's conviction. In his appeal, defendant challenged the admission into evidence of the decedent's declarations. As previously stated, this Court set forth the testimony before the Coroner and substantial reliance was placed upon it in affirming the admissibility of the first declaration as spontaneous. The admission of the second declaration was held "not prejudicial error since it added nothing to the admissible earlier statement." Lampe v. U. S., supra, 97 U. S. App. D. C.,

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[8] Up to now, this Court probably does not know that the Coroner's inquest testimony of Chief Schatz was not reported in its entirety in the previous appeal. The District Court's order referred to in fn. 7 above certainly indicates that it would be -- the reference to "pages 15 through 20" does not indicate the contrary (App. 171), and the previous Joint Appendix (pp. 108 - 109) has no asterisks or other symbols to show that there was further testimony of Chief Schatz before the Coroner which the trial court read. This additional testimony, although, in part, damaging to Lampe, also constituted effective impeachment of either Chief Schatz or Officer Miller, who testified to these declarations at the trial. Although both Schatz and Miller had indicated that they were together at all times and both heard these initial spontaneous declarations, Miller testified at the trial that he did not hear LaMar say that Lampe was the principal offender (J.A. 35). But see App. 12. Further, this additional testimony of Schatz at the inquest was effective impeachment of co-defendant O'Brien, who was really the prosecutor's best witness against Lampe. O'Brien had denied actively participating in the theft from LaMar in his confession (J.A. 63; App. 100); in his testimony at the inquest (App. 16-17); and at the trial (J.A. 72-73, 77-78). Yet Schatz had testified at the inquest in this additional testimony that LaMar had said that both Lampe and O'Brien had gone through his pockets (App. 13).

at 163, 229 F. 2d, at 46. Thus, the admissibility of both the first and second declarations was supported, at least in part, by the testimony taken before the Coroner. In regard to the third declaration, which, like the others, pointed an accusatory finger at defendant, this Court held that although this declaration was not spontaneous and thus should not have been admitted, there was no prejudicial error because, inter alia, "there would still have been before the jury LaMar's first declaration which may be said to have charged the two men with equal participation in the crime."

In summary, it may be said that the testimony taken before the Coroner did have a substantial influence in defendant's conviction, as well as the affirmance of that conviction. True, there was other incriminating evidence against defendant consisting primarily of his confession, which, as will be shortly demonstrated, was the irrational and irresponsible product of a mind in thefull sway of delirium tremens. Notwithstanding this, the testimony before the Coroner cannot and should not be brushed aside. That testimony was elicited at a proceeding in which defendant was wrongfully deprived of counsel and was himself hedged in by the requirement that he interrogate witnesses "through" the Coroner. And whether or not such testimony will be used at trial in homicide cases, the Sixth Amendment requires protection of the accused by assuring legal representation for him when this crucial link in the chain of conviction is forged (Johnson v. Zerbst, supra).

Again we state, as we did at the outset, that this case involves an important question, particularly for this jurisdiction, concerning the pre-trial procedural rights of one accused of a homicide. The important procedures before the Coroner should be clarified once and for all by this Court so that those accused of the gravest of crimes are not afforded less protection than those accused of lesser crimes.

II. INDEPENDENT INVESTIGATION BY COUNSEL APPOINTED BY THE COURT AFTER THIS APPEAL WAS INITIATED HAS REVEALED EVIDENCE OUTSIDE THE ORIGINAL RECORD THAT DEMONSTRATES A FUNDAMENTAL MISCARRIAGE OF JUSTICE IN PETITIONER'S CONVICTION.

A. Introduction.

Counsel appointed by the Court to represent appellant on this appeal has been impressed with certain facts in this case that are inconsistent with appellant's conviction of murder in the second degree. As will be shown in section III, *infra*, there is no doubt as to the unreliability of appellant's alleged confession, and there is serious doubt as to whether it was made voluntarily. Appellant, however, has found himself throughout the proceedings with the overwhelming task of having to prove the negative when he in fact remembers nothing at all.

Four facts of record prior to this appeal have particularly impressed counsel herein. *First*, bearing upon appellant's good faith and sincerity in stating that he has no memory of having committed the crime or of having confessed, is the fact that he rejected the strenuous urgings of the trial court[9] and of his own trial counsel that he plead guilty to a lesser offense. He insisted that he did not remember committing the offense (App. 52).

The *second* fact that has impressed counsel relates to the questionable nature of the confession, which is discussed fully

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[9] This urging of the trial court occurred after Dr. Orsinger had first testified outside the presence of the jury at a time when the trial court had tentatively decided to admit the confession *because* of the Doctor's testimony (App. 51, 54). The Court said: "And the doctor testified about when he saw the defendant . . . You have this testimony and it is damaging, but your man tells you he doesn't remember what happened" (App. 54). Uppermost in the Court's mind, of course, was the fact that the Doctor had testified that he had examined Lampe just prior to the release from the hospital and the confession, and found him rational (App. 34, 43).

in section III herein, and which was the principal basis of the conviction. When appellant was temporarily "discharged" from the hospital and a confession obtained, he was not first taken before a magistrate, although the discharge was at 10:00 in the morning. This fact, in itself, is not here alleged as grounds for vacating his sentence. It is significant, however, that depriving appellant of his right to preliminary hearing at that time, which would have included persons not of the police force (an attorney, or magistrate, or both), has, in this case, also deprived him of the opportunity to corroborate his own evidence regarding his lack of competence at the time of the confession. (See Mr. Justice Black's dissent in In Re Groban, 352 U. S. 330, 340-343, 1 L. Ed. 2d 376, 384-386 (1957)).

Third, appellant's lack of memory as to dictating and signing a confession was met at trial only with the testimony of the police officers who said that he had confessed in their presence. Sgt. Schwab, for example, testified at the trial that appellant had given the confession on the morning of July 19, 1954 (App. 29). Yet on July 23, 1954, just four days after the alleged confession, Sgt. Schwab testified at the Coroner's inquest, and not only made no mention of the confession (App. 15-19), but said first that Lampe remembered nothing after drinking two half gallons of wine (App. 15), and, finally (obviously referring to the confession), that Lampe remembered nothing after LaMar had pushed him in the chest (App. 17). This, of course, was far less than the admissions contained in the written confession (App. 95-96). Furthermore, it must have been more than coincidence that the homicide division police happened to be on hand to obtain a confession just when Lampe was released from the hospital to return to the cell block. Also, it seemed inconceivable that a person in Lampe's condition could have remembered the precise details which he allegedly gave in his confession. A close

reading of the two confessions shows an amazing consistency in the very words and phrases allegedly used by Lampe and O'Brien, who had just confessed, suggesting that these words had been put into Lampe's mouth. Further, aside from the confession, every witness in the case stated that Lampe had no recollection of the crime (App. 7, 8, 9, 13, 15, 17, 40, 42, 47, 61).

O'Brien's confession:

> "Then I left and went and bought a half gallon of wine. When I returned Fred and Virgil were sitting on the ground about 20 feet from the bench. The three of us drank almost the whole half gallon of wine. It was getting close to dark and we all was feeling pretty good. Then Virgil accused Fred of being a pimp for the police department" (App. 100).

Lampe's confession:

> "O'Brien came back with a half gallon of wine and we drank almost all of that half gallon. Then trouble started between Fred and me. We started arguing again about the wine. Then I accused Fred of being a police pimp because everything that happened around there the Mt. Rainier Police was right behind us and I figured that Fred was telling them" (App. 95).

* * * *

O'Brien's confession:

> "Then I saw Fred move his hand I don't know whether he struck Virgil or not" (App. 100).

Lampe's confession:

> "I was sitting next to Fred, he was on my right and Fred hauled off and hit me in the left side of my chest with his fist" (App. 95-96).

* * * *

O'Brien's confession:

> "Then Virgil took the stump of his left arm and wrapped it around Fred's neck. Then he took his right arm and started striking Fred" (App. 100).

Lampe's confession:

> "I grabbed him around the neck with my bad arm and then I hit him three or four times with my other hand" (App. 96).

Fourth, a close reading of Dr. Orsinger's testimony given first out of the presence of the jury (App. 31-47) and later before the jury (App. 66-79), made it apparent that the Doctor had no personal recollection of Lampe or the facts of his case, and therefore had to rely entirely on the hospital's file on Lampe and the custom and practice of the hospital (App. 43). For example, it appeared from the testimony that Dr. Orsinger's initial positive statement that Lampe had been "discharged" from the hospital on the morning of July 19th at about 10:00 a.m. (just prior to the confession) (App. 32, 35, 69), was based only upon a nurse's note to the effect that Lampe had been "readmitted" at 3:40 p.m. on July 19th (App. 69-70). Even the time of discharge as being 10:00 or 10:30 a.m. was assumed by the Doctor from his usual routine (App. 34), and when the Doctor was asked a direct question as to when and why Lampe subsequently returned to the hospital, he replied, "It was called to our attention that afternoon, it doesn't state here and I don't remember the exact way, but the usual way is that some officer in the cell block will call us and say this man is not doing so well, maybe you better look at him again, and at 3:40 he was readmitted to the hospital on my order" (App. 35). Later the Doctor said to the same question, "I don't remember how it happened. It is not stated in this record . . ." (App. 69).

Even as to his examination of Lampe prior to discharge, when asked whether he had actually talked to Lampe and asked him the five cursory questions referred to in section III herein, he replied, "I can't swear that I did. I say that I go through that routine as a matter of doing my business at the D. C. Jail" (App. 43).

It was finally apparent that neither defense counsel nor the court examined the hospital file itself which Dr. Orsinger had brought with him (App. 32, 67), and from which he testified (App. 32-37, 69-70).

B. An Independent Investigation Was Necessary.

Since it is fairly common knowledge that admissions to, and discharges from hospitals entail more formal entries and records than mere notations on nurses' charts, and since a number of crucial presumptions had been indulged in to show Lampe's competence and to admit the confession, counsel herein believed it important and necessary to examine the original hospital records from which the Doctor was testifying, but which had not been introduced at the trial. The pertinence of this examination to the issues on this appeal is far greater than in an ordinary case, because Lampe's confession was vital to the prosecution's case and, in fact, was one of the primary reasons for this Court's affirmance of the conviction.

In summary, therefore, the trial court and the jury were both impressed with the fact at trial that Lampe was not a hospital patient actively undergoing treatment for dt's when he gave his confession, but were told that he had been examined and discharged from the hospital to return to the cell block, and, further, that it did not become necessary for him to return for further treatment until 3:40 p.m., which was three hours and fifteen minutes after the confession was completed. But, if Lampe had not been discharged from the hospital, he had not had even a superficial examination by Dr. Orsinger at 10:00 or 10:30 a.m., nor had he been found rational and competent to leave the hospital prior to the confession. Thus, if the hospital records do not corroborate the fact that Lampe was discharged at 10:00 or 10:30 a.m. and later readmitted to the hospital at 3:40 p.m. that same day, both the trial court and the jury were seriously misled at the trial, and Lampe, of course, was fatally prejudiced thereby.

C. Results of the Independent Investigation.

Appellate counsel have therefore conducted an independent investigation into the circumstances attending appellant's discharge from the jail hospital, his confession, and his readmission to the hospital for treatment for delirium tremens. A visit to Lorton Penitentiary on January 13, 1960, where all of appellant's medical records are now kept, has revealed some startling facts. Pertinent copies are attached hereto as exhibits.

1. The Temperature Chart. According to the prosecution witnesses, including the Senior Medical Officer of the jail hospital, appellant was in the jail -- not in the hospital -- from 10:00 or 10:30 a.m. until 3:40 p.m. It is during this time, specifically between 11:30 a.m. and 12:25 p.m., that appellant is said to have confessed (App. 37). Appellant's Temperature Chart shows, however, that his temperature was being taken at the hospital at 12:00 noon on July 19, and was recorded at 100° (Exhibit 1 hereto).[10]

2. Pulse Chart. Also at 12:00 noon on July 19, while appellant was alleged to have been in the middle of dictating a confession, his Pulse Chart shows that his pulse was being taken at the hospital and was recorded at 90 (Exhibit 1 hereto).

3. Respiration Chart. Also at 12:00 noon on July 19, while appellant was alleged to have been in the middle of dic-

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[10] If appellee should argue that, merely for convenience, the nurse used the "12 o'clock noon" column to record the temperature at 10:00 or 10:30 a.m. when Lampe was "discharged," can appellee then answer why Dr. Orsinger testified twice that one of the principal reasons Lampe was discharged was because his temperature was then "normal" (98.6°) (App. 36, 73). Further, a more convenient space for temperature taken at 3:40 p.m. that day, when Lampe was allegedly "readmitted," would have been the 4:00 p.m. column, but this entry was omitted entirely, and the next reading after 12:00 noon was 8:00 p.m. that night.

tating a confession, his Respiration Chart shows that his respiration was being taken at the hospital, and was recorded at 20 (Exhibit 1 hereto).

4. Nurses' Record. Finally, the Nurses' Record for July 19 contains the hourly entry, on one line: "8-12 - Yeast Tabs - resting in bed. Seen and discharged by Dr. Orsinger." This is followed on the next line by the entry: "4 p.m. - Yeast Tabs." This, in turn, is followed by a reference to 3:40 p.m., when appellant was said to have been "readmitted" (Exhibit 2 hereto).

5. Doctors Orders Sheet and Admission Record. The Doctor's Order Sheet says for July 19, 1954: "Discharged - cancelled - Dr. Orsinger." It does not say "readmitted" (Exhibit 3 herein). The Admission Record has an entry, "Date of Discharge - 7-19-54," which is crossed out, and then "7-22-54" is inserted (Ex. 4).

6. The Daily Record at the Central Control Office. Upon counsel's recent inquiry at the D. C. Jail, it was learned that the Central Control Office of that institution keeps a daily record showing intra-jail movements of prisoners. That record for July, 1954 was located on January 15, 1960, just prior to the filing of this brief, but too late for copies to be obtained to file herein. This daily record shows that Lampe was moved on July 17, 1954 from CB-1 to Jail Hospital. There is no record of any movement from the jail by Lampe on the 18th through the 21st -- including the 19th, which was the date of the alleged confession. The record for July 22, 1954 shows that Lampe was moved from Jail Hospital to CB-2.

D. Argument.

None of the above facts regarding the hospital records.

have as yet been of record in this case.[11] Had they been known to the judge and jury, it is extremely unlikely that the confession would have been admitted, and appellant could not reasonably have been convicted. And even if they had been known to appellant's counsel on the original appeal, these same facts, dehors the record, could not have been the basis of reversal (Waley v. Johnston, 316 U. S. 101 (1942) - habeas corpus; unanimous decision).

Appellant does not mean to imply perjury by the police officers or the medical officer, nor does he mean to imply knowing use of perjured testimony by the prosecution. Cf., Mooney v. Holohan, 294 U. S. 103 (1935). But surely, even without any such allegations, the facts related above pose the very case for which §2255 was designed. Surely these facts call for "an inquiry in a court of the United States into the very truth and substance of the causes of his detention." Johnson v. Zerbst, 304 U. S. 458, 467 (1938). Surely on such facts as these the trial court is called upon "to look beyond forms and inquire into the very substance of the matter." Id.[12] These must indeed be "the exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." Bowen v. Johnston, 306 U. S. 19, 26-27 (1939). For here, there is every reason to believe, there has been "a fundamental miscarriage of justice for which no other

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[11] And even without the remedy of §2255, this being a death case, this Court has long held that it can examine the "entire record," even without regard to assigned errors, to determine whether the accused has had a fair and impartial trial (McKenzie v. U. S., 75 U. S. App. D. C. 270, 126 F. 2d 533 (1942)). Further, this Court has required matters previously outside the record to be made matters of record in habeas corpus petitions involving lesser offenses than here (Moore v. Reid, 100 U. S. App. D. C. 373, 246 F. 2d 654 (1957)).

[12] In fairness to the trial court which denied the §2255 petitions without hearings, these medical records have never been presented to it. A similar situation occurred in the Coates case, infra (see fn. 1 of that opinion).

adequate remedy is presently available." Hill v. U. S., 223 F. 2d 699 (6th Cir. 1955) (per curiam opinion by Mr. Justice Potter Stewart and Judges Martin and Miller), and this is the very case where a "collateral remedy is required in order to avoid manifest injustice" (Hodges v. U. S., infra).

III. A HEARING ON APPELLANT'S MOTION UNDER §2255 WAS REQUIRED BECAUASE HIS ALLEGED CONFESSION WAS ADMITTED INTO EVIDENCE IN VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION, AND THE MOTION, THE FILES AND THE RECORD OF THE CASE DO NOT CONCLUSIVELY SHOW THAT APPELLANT IS ENTITLED TO NO RELIEF.

A. Introduction.

The record herein shows the following:

Shortly after his arrest, appellant was hospitalized for delirium tremens (App. 32). Delirium tremens is an "acute alcohol[ic] brain syndrome, his brain was disturbed as a direct effect of his drinking" (App. 32), a "toxic psychosis" (App. 33), rendering the brain abnormal and irrational (App. 37, 68). In fact, in response to a question by the court, the medical expert testified that appellant showed evidence "of unsound mind" (App. 33).

The morning following appellant's hospitalization in this condition, Sgt. Schwab of the Homicide Bureau was notified of LaMar's death (App. 3), and within two hours thereafter, appellant was "released" from the hospital and returned to jail (App. 32). For purposes of discharging appellant, the doctor in charge gave appellant only a "superficial" examination (App. 33-34, 39), based upon five short questions and answers (App. 42-43), and lasting "just a few seconds" (App. 79). Although on the basis of this admittedly superficial examination appellant appeared to be "better than the other men who needed his bed" (App. 43), the same doctor later had serious misgivings as to the reliability of appellant's confession, based upon appellant's condition later the same day (App. 74, 76).

Upon his return to the jail, appellant's confession was completed within 2-1/2 hours (App. 37). Only three hours thereafter, in classic understatement, appellant was determined to be "not well" (App. 69). That very night, his delirium tremens

was "full-blown" and "it was necessary to strap him down in restraints" (App. 36).

It is perhaps superfluous to add that any confession taken at such a time would be, as stated by the doctor, of doubtful reliability. Even one of the police officers who was present during the "confession" testified:

> "Q. How long did it take him to answer a very simple question? A. Well some of the questions he didn't understand. They were repeated for him and it would take him a couple of minutes . . ." (App. 89) (emphasis added).
>
> * * * *
>
> "Q. You thought at the time [of the confession] he was suffering from too much alcohol? A. . . . No. From the after effects of too much alcohol" (App. 91) (emphasis added).

The only medical expert at the trial testified as follows regarding the confession:

> " . . . Now, reading that statement [the confession], it seems a logical sequence of events.
>
> "I must also say that I have had other statements made to me by people bordering on the dt's, or in dt's, which seemed like a logical statement, and then when I questioned further in that condition, I would find that the statement had many irregularities in it.
>
> "To use, for example, the person that confesses to a crime that he didn't commit.
>
> " . . . Dt people, people bordering on them or going into them, may make statements which, while logical to us, may not necessarily be so" (App. 38-39) (emphasis added).
>
> * * * *
>
> "I don't think you could place reliability on everything that is said by a man that is about to go into dt's, or went into dt's in that period I showed, three days to a week.
>
> "You could not count them as the statements of a normal brain" (App. 37) (emphasis added).

B. Section 2255 Requires A Hearing Unless the Motion, the Files and the Record of the Case Conclusively Show That Appellant Is Entitled to No Relief.

Section 2255 is unambiguous regarding the duty of the District Court to grant a hearing upon a motion under §2255:

> "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto" (emphasis added).

The Supreme Court has unanimously held that a literal application of similar mandatory language is "the only admissible procedure. Nothing less will satisfy the command of the statute that the judge shall proceed 'to determine the facts of the case, by hearing the testimony and arguments.'" Walker v. Johnston, 312 U. S. 275, 285 (1941); cf., Bailey v. U. S., 101 U. S. App. D. C. 11, 246 F. 2d 698 (1957), reversing denial of a §2255 hearing, citing Walker v. Johnston, supra.

A case in this Court closely analogous to the instant case is Coates v. U. S., ___ U. S. App. D. C. ___, ___ F. 2d ___ (No. 15,203, this Court, decided December 10, 1959). There the motion under §2255 alleged that appellant was under the influence of drugs when he entered a guilty plea. Several hours prior to his plea, appellant had been found competent by a doctor, though the doctor noted that appellant would "soon begin to suffer symptoms of withdrawal from drugs." Coates v. U. S., supra, slip opinion at pp. 2, 4. This Court held:

> "We cannot tell -- nor does the record disclose how the files or any material to be found therein could demonstrate 'conclusively' that appellant was entitled to no relief. Thus the clear command of the statute required that a hearing be held." Id., slip opinion at pp. 2-3 (latter emphasis added).

C. The Only Way to Resolve Substantial Issues of Fact Regarding the Involuntariness of Appellant's Confession Is By a Hearing in the District Court.

In the Coates case, discussed immediately above, the Court emphasized that relevant issues of fact could not be conclusively determined on the trial record, thereby necessitating a hearing under §2255. The Court was there referring to medical facts regarding the effect upon appellant of withdrawal from narcotics at the time of appellant's plea of guilty. See Coates v. U. S., supra, slip opinion at pp. 3-4.

The factual issues in the present case are strikingly similar. As will be shown at pages 34-39 below, appellant was deprived of constitutional rights relating to self-incrimination and due process of law. In brief, the confession admitted into evidence against him "most probably was not the product of any meaningful act of volition," due to incipient delirium tremens. Cf., Blackburn v. Alabama, ___ U. S. ___ (No. 50, decided January 11, 1960), slip opinion at p. 12. The facts regarding this issue that the record does not show are as persuasive as the facts that the record does show in demonstrating the need in this case for a hearing in the sentencing court.

As in Blackburn, Lampe himself has no recollection of the fight or of the alleged confession (App. 129-149). This is typical of Lampe's experience with delirium tremens (App. 137),

as with Blackburn's experience with amnesia. Cf., Blackburn v. Alabama, supra, slip opinion at p. 3.

Of particular significance, therefore, is the absence in the record of any direct testimony regarding the effect of delirium tremens upon the will. Cf., Coates v. U. S., supra. The only competent testimony regarding appellant's mental condition was directed not to volition (the constitutional issue), but to reliability (an evidentiary issue). See App. 37-39. Moreover, there was no psychiatric expert at the trial, despite several disclaimers by the medical expert of competence to render a psychiatric opinion on various issues vital to proper disposition of this case (App. 33, 37, 41). On these very issues, however, the conclusion was expressed by laymen (with no warning instruction to the jury) to the effect that appellant's confession was "freely and voluntarily" given (App. 29, 48, 56, 87). Yet this very Court has held:

> "Also obvious upon a moment's reflection is the fact that, while a lay witness's observation of abnormal acts by an accused may be of great value as evidence, a statement that the witness never observed an abnormal act on the part of the accused is of value if, but only if, the witness had prolonged and intimate contact with the accused." Carter v. U. S., 102 U. S. App. D. C. 227, 237, 252 F. 2d 608, 618 (1957).

See also, Hopkins v. U. S., No. 14,939, this Court, decided December 11, 1959.

It is, therefore, of little substance that the jury apparently found that the confession was "freely and voluntarily" given. The record was devoid of any direct competent medical evidence on this issue. An appellate court is not bound by such a finding when the record demonstrates it to be contrary to fact. Chambers v. Florida, 309 U. S. 227, 84 L. Ed. 716 (1940) (unanimous decision); Blackburn v. Alabama, supra (unanimous decision). Similarly, this Court should not hesitate to find in the present case that the record is devoid of facts essential to determine

whether the confession was or was not voluntary, because only lay testimony was directed to the issue of "voluntariness," while expert medical testimony was directed only to the issue of "reliability." There is an interesting parallel between the Coates case and the facts here. In Coates, this Court relied heavily on the following:

> "Dr. Griffin's report showed that the prisoner would 'soon' begin to suffer withdrawal symptoms. How soon was 'soon'? What are 'symptoms of withdrawal from drugs'? How are they manifested. What is their effect? The 'symptoms will reach their maximum in about 24 hours,' the doctor advised the court. He even recommended hospitalization during that withdrawal period, as appellant's counsel had asked." Coates v. U. S., supra, slip opinion at pp. 3-4.

Here, Dr. Orsinger testified in substantially the same fashion, leaving unresolved substantially the same issues. He said, referring to dt's as in Lampe's case:

> " . . . the average case starts within 24 hours after the withdrawal of the alcohol, but there are many cases that start within 36 or 72 hours later" (App. 37).

The motion, files and record, therefore, do not "conclusively show that the prisoner is entitled to no relief." Just as in the Coates case, supra:

> "The only way to have resolved the issue was by a hearing after which the facts could have been found and applicable conclusions of law could have been made." Id., slip opinion at p. 5.

D. Appellant's Conviction Resulted From a Deprivation of His Rights Under the Fifth Amendment to the Constitution, and Not Merely From an Error by the Trial Judge Regarding a Rule of Evidence.

Lampe's alleged confession was taken when he was about to enter "full-blown" delirium tremens (see pp. 29-30, supra).

This fact not only rendered any confession by him of doubtful reliability. It also raises the serious constitutional issue -- not open to resolution without a further hearing -- that appellant's confession "most probably was not the product of any meaningful act of volition." Cf., Blackburn v. Alabama, ___ U. S. ___ (January 11, 1960) (unanimous decision; no physical coercion), slip opinion at p. 12. As a result, "the use of this evidence to convict [Lampe] transgressed the imperatives of fundamental justice which find their expression in the due process clause . . ." Id., slip opinion at p. 12. Cf., Fikes v. Alabama, 352 U. S. 191 (1957) ("no evidence of physical brutality"); Chambers v. Florida, 309 U. S. 227 (1940) (unanimous decision).

There is an important distinction between the involuntary confessions in the cases cited immediately above, and a confession that is "involuntary" in the sense that that word is used in cases following McNabb v. U. S., 318 U. S. 332 (1943), and Mallory v. U. S., 354 U. S. 449 (1957). In Blackburn and Fikes, as in the present case, there was no physical coercion, but the confession that was introduced into evidence nevertheless was "not the product of any meaningful act of volition." Cf., Blackburn v. Alabama, slip opinion at p. 12. Admission of such a confession into evidence, of itself, constitutes a violation of the due process clause, regardless of whether "other evidence establishes guilt or corroborates the confession." Blackburn v. Alabama, ___ U. S. ___ (No. 50, decided January 11, 1960), slip opinion at p. 7.

In cases under the McNabb - Mallory rule, on the other hand, the confessions referred to as "involuntary" may have actually been given freely and voluntarily, but have been labeled "involuntary" because made during illegal detention. In order to discourage the practice of questioning during illegal detention, and in order to preserve the integrity of the administration of criminal justice, the Supreme Court has thus upset convictions based upon voluntary confessions obtained during illegal detention.

The Court has done this not under compulsion of the Constitution, but as a rule of evidence. As stated by two of our leading constitutional scholars, Professors Hogan and Snee, in analyzing the McNabb - Mallory rule:

> "First, it is certain that the reasons for excluding the confessions flow from a nonconstitutional source [quoting from McNabb at 318 U. S. 332, 340]. Second, the doctrine announced in the [McNabb] case is derived from the inherent power of the Supreme Court to formulate 'rules of evidence to be applied in federal criminal prosecutions' [citing McNabb, at 341] . . ." Hogan & Snee, The McNabb - Mallory Rule, 47 Georgetown L. J. 1 (1958) (emphasis added).

Similarly, it has been held that "Illegal detention is a non-constitutional and non-jurisdictional defect . . ." U. S. v. Morin, 163 F. Supp. 941, 944 (S.D. Pa., 1958) (emphasis added).

The failure to recognize the distinction between a truly involuntary confession that constitutes a violation of the Constitution, and an "involuntary" confession in the McNabb - Mallory sense, has led to considerable confusion in the decisions. This confusion has been compounded by the fact that many of these cases were decided after McNabb (1943) and after Mitchell v. U. S., 322 U. S. 65 (1944), but before Mallory (1957).

As explained by Hogan & Snee, the McNabb opinion was "somewhat of a mystery" and "elusive," and "bewildered the judiciary." Hogan & Snee, op. cit., at 3, 4. Mitchell, however, served only to add to the bewilderment. After Mitchell the McNabb rule "remains surrounded by a vague penumbra, and its outlines defy definition." Note, 47 Col. L. Rev. 1214, 1220 (1947). Mitchell, in fact, "sent the McNabb rule into eclipse." Hogan & Snee, op. cit., at 8. As the same authors point out, in the 4-1/2 years after Mitchell was decided, the McNabb rule was successfully invoked only once.

It was during this period of uncertainty in the law -- when McNabb (1943) had been "eclipsed" by Mitchell (1944), and Mallory (1957) had not yet been decided -- that a number of cases

were decided holding that admission into evidence of confessions taken during illegal detention is not "jurisdictional" error in habeas corpus or §2255 proceedings. It is questionable whether these cases would have been decided in the same way if they had arisen after Mallory. One of such cases was Eury v. Huff, 79 U. S. App. D. C. 289, 146 F. 2d 17 (1944), in which this Court held:

> "Assuming the petition means that an involuntary confession was actually received in evidence [citing McNabb], still that question could not be retried by the procedure of habeas corpus. Sufficiency of the evidence to support a conviction is not jurisdictional and is not open to review in habeas corpus proceedings." Id., 146 F. 2d, at 17-18.

There are two important points to note in this decision. First, although the Court refers to an "involuntary confession," there was no showing in the Eury case that the confession was truly involuntary in the constitutional sense. The opinion recites that aside from the claim of illegal detention, Eury claimed "that he was subjected to constant physical and mental pain," but the opinion does not say that Eury showed this resulted in a coerced or truly involuntary confession. Thus we assume that the appellant in Eury argued only that he had voluntarily made incriminating statements because of an illegal detention. This, in fact, is the understanding of the Eury case expressed by this Court in Smith v. U. S., infra, where the Eury case is labeled a case of "confessions obtained by illegal detention."

Second, in reaching its conclusion in Eury, the Court relied heavily on Mitchell, the case that had "eclipsed" McNabb. Quoting Mitchell, the Court held that the power of shaping rules of evidence "is not to be used as an indirect mode of disciplining [police] misconduct." Eury v. Huff, 146 F. 2d, at 18. Since the McNabb rule at the time of the Eury decision was not even being invoked successfully on appeal (see Hogan & Snee, op. cit., at 8), it is little wonder that it was not applied in Eury, which was a habeas corpus proceeding.

Eury v. Huff, therefore, is distinguishable from the instant case on the ground that the confession in Eury was "involuntary" only in the McNabb sense. Further, the Eury case is considerably weakened as authority -- and should be limited whenever possible -- because of its heavy reliance on Mitchell v. U. S., since clarified by Mallory. In both these respects, the Eury case is typical of the cases that appear to suggest that the scope of review under §2255 is a very narrow one.

Another case in the Eury group prior to Mallory is Smith v. U. S., 88 U. S. App. D. C. 80, 187 F. 2d 192 (1950), cert. den., 341 U. S. 927 (1951). In that case the Court again held -- not reaching the instant case -- that "admission of confessions obtained by illegal detention is not a ground for collateral attack . . . [citing Eury v. Huff]." Id., 88 U. S. App. D. C. at 85, 187 F. 2d, at 197 (emphasis added). This, in fact, was stated by the Court to be "the precise question" in the Smith case (id.). One interpretation of Smith, therefore, is that the court found that there was not in issue "a denial of 'constitutional rights,'" but "merely the erroneous admission of evidence." In the present case, of course, the confession was truly involuntary in the direct constitutional sense of violation of the due process clause, since it "most probably was not the product of any meaningful act of volition" (Blackburn v. Alabama, ___ U. S. ___ (January 11, 1960), slip opinion at p. 12). Under this interpretation, Smith v. U. S. is therefore clearly distinguishable. On the other hand, if Smith says that, regardless of whether the confession was truly involuntary, its admission into evidence is not per se a violation of the due process clause, Smith is then inconsistent with Blackburn and with Bowen v. Johnston, 306 U. S. 19 (1938).

Hodges v. U. S., ___ U. S. App. D. C. ___, ___ F. 2d ___, No. 14,683 (December 30, 1959), which is otherwise distinguishable as shown below, reaffirmed the principles of the

Smith case, the Court assuming, arguendo, that the confession was truly involuntary. On this assumption, we submit the Court could have permitted relief under §2255 without even calling Smith into question, because, as indicated above, Smith did not involve a truly involuntary confession. A reading of the Hodges opinion would indicate that appellant did not attempt to distinguish Smith. On the contrary, the Court there stated, "Our problem now is whether [Smith v. U. S.] should be abandoned." Hodges v. U. S., slip opinion at p. 5.

It is submitted, therefore, that appellant here should not be foreclosed from consideration of this distinction, which could be vital to his case, because of the failure of an earlier appellant to raise the issue.

E. The Court Has Power Under a §2255 Motion To Do Substantial Justice on the Merits of the Case, Regardless of Whether Petitioner Has Previously Raised the Constitutional Deprivation on Appeal.

Petitioner has never had a hearing in any appellate court regarding the violation of his constitutional rights by admission into evidence of the involuntary confession. In fact, the present motion under §2255 is all the more urgent because, as shown above at pp. 29-34, appellant has never even had proper consideration of this issue at the trial level. Clearly there is "a fundamental miscarriage of justice" when a man is convicted of second degree murder without an adequate hearing in any court as to the deprivation of a constitutional right. Cf., Hill v. U. S., 223 F. 2d 699 (6th Cir. 1955) (per curiam opinion, with Justice Potter Stewart a member of the court); Coates v. U. S., ___ U. S. App. D. C. ___, ___ F. 2d ___ (No. 15,203, decided December 10, 1959).

Even were we to assume, however, that there were adequate facts of record in this case on which to have based a direct appeal

on the inadmissibility of the involuntary confession, appellant should not be barred from a §2255 review of the deprivation of his constitutional rights. As stated by the Supreme Court in an opinion by Chief Justice Hughes:

> "The rule requiring resort to appellate procedure . . . is not a rule denying the power to issue a writ of habeas corpus when it appears that nevertheless the trial court was without jurisdiction. The rule is not one defining power but one which relates to the appropriate exercise of power . . . The rule is not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." Bowen v. Johnston, 306 U. S. 19, 26-27 (1939) (emphasis added).

It is now settled law that denial of a defendant's constitutional right deprives the trial court of jurisdiction. Johnson v. Zerbst, 304 U. S. 458 (1938). In the present case the introduction into evidence of an involuntary confession was a violation of appellant's constitutional rights under the Fifth Amendment. Blackburn v. Alabama, ___ U. S. ___ (January 11, 1960). The trial court was therefore deprived of jurisdiction, and the conviction is open to review under §2255 regardless of whether appellant raised or could have raised the same issue on direct appeal. Bowen v. Johnston, supra; Johnson v. Zerbst, 304 U. S. 458 (1938). As stated by the Supreme Court in Johnson v. Zerbst, supra:

> "True, habeas corpus cannot be used as a means of reviewing errors of law and irregularities -- not involving the question of jurisdiction -- occurring during the course of trial; and the 'writ of habeas corpus cannot be used as a writ of error.' These principles, however, must be construed and applied so as to preserve -- not destroy -- constitutional safeguards of human life and liberty . . . Congress has expanded the rights of a petitioner for habeas corpus and the 'effect is to substitute for the bare legal review that seems to have been the limit of judicial authority under common law practice . . . a more searching investigation, in which . . . the court, upon determining the actual facts, is to "dispose of the party as law and justice require" . . .'" Id., at 467.

In neither Bowen v. Johnston nor Johnson v. Zerbst had the petitioner for habeas corpus taken a direct appeal. Yet in

each of those cases, the Supreme Court exercised its power "to dispose of the party as law and justice require." The present appellant has asked for no more, and he is entitled to no less.

The holding in Smith v. U. S., 88 U. S. App. D. C. 80, 187 F. 2d 192 (1950), cert. den., 341 U. S. 927 (1951), can be construed as being entirely consistent with appellant's position. The Court there clearly recognized the difference between a case involving "the denial of any constitutional right" -- in which case "habeas corpus is available" -- and a case involving merely "alleged error of the trial court . ... in the admission of evidence" -- in which case direct appeal is the appropriate remedy. Id., 187 F. 2d, at 197 (emphasis added).

The Smith decision relied most heavily upon "the proper application of the principle so clearly set forth in Sunal v. Large, [332 U. S. 174 (1947)]." Id. In the Sunal case the Court held that the petition for habeas corpus had not shown deprivation of any constitutional right, but had shown only that evidence tendered in defense had been improperly excluded. Granting the writ in that case would have allowed "collateral review of errors of law committed by the trial court . . . and other errors of trial procedure that do not cross the jurisdictional line." Sunal v. Large, 332 U. S. 174, 179 (emphasis added). Errors that "do not cross the jurisdictional line" were contrasted by the Court in Sunal with cases -- such as the instant case -- in which "the trial or sentence by a federal court violated specific constitutional guarantees." Id. (emphasis added). And the Court later reiterated that the requirement of a direct appeal is a bar in habeas corpus proceedings "where the error does not trench on any constitutional rights of a defendant or involve the jurisdiction of the trial court." Id., at 182 (emphasis added).

Both Smith v. U. S., supra, and its mainstay, Sunal v. Large, supra, are therefore entirely consistent with granting the

present appellant's motion under §2255.

The recent case of Hodges v. U. S., ___ U. S. App. D. C. ___, ___ F. 2d ___ (No. 14,683, December 30, 1959), is also distinguishable from the instant case. In Hodges there was no allegation of any deficiency in the record regarding the inadmissibility of the confession. In fact, as noted by the Court in Hodges:

> "Appellant contends that the evidence as to which the confession was obtained shows as a matter of law that the confession was coerced . . ." Id., slip opinion at (emphasis added).

The Court also stated that the trial transcript was before it on appeal, and that the evidence regarding the allegedly involuntary confession was contained in the transcript and had been considered by the trial judge. Therefore, a direct appeal was possible in Hodges on the very issues raised there under §2255.

This fact, of course, renders the Hodges case distinguishable on a crucial point. In the present case, appellant has demonstrated in sections II and III-C, supra, the necessity for a hearing under §2255 for the purpose of adducing essential facts that do not appear of record, and which therefore were not considered at trial and could not have been presented as grounds for reversal on appeal. In Waley v. Johnston, 316 U. S. 101 (1942), for example, the Supreme Court unanimously held that habeas corpus lies where appellant alleges facts that are dehors the record and which, therefore, could not have been used as grounds for appeal. The Court so held even though appellant's allegations in Waley seemed to "tax credulity" (id., at 104).

Habeas corpus, the Great Writ, has been described as "the most celebrated writ in the English law." U. S. v. Hayman, 342 U. S. 205, 72 S. Ct. 263, 96 L. Ed. 232, 237 (1952), quoting from 3 Bl. Comm. 129. Under Congressional legislation in the United States, the writ has been extended to permit the courts to "dispose of the party as law and justice require" by going beyond